Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

BETTY J. WATKINS,

Petitioner,

v.

NORTEL NETWORKS, INC. D/B/A
NORTHERN TELECOM, INC.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The following questions are presented for review:

1. Does the Supreme Court's opinion in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 139 L. Ed. 2d 849, 118 S. Ct. 838 (1998), allow Petitioner to set aside a release, which releases Older Workers Benefit Protection Act ("OWBPA") claims, without tendering back the proceeds, when the underlying claims relate to the parties' understanding of the OWBPA, and should *Oubre* be clarified and expanded?

2. Whether Petitioner's claims of fraud, duress and mutual mistake were brought forth in a timely manner and should be presented to a jury?

PARTIES TO THE PROCEEDINGS

The caption already contains all parties in this civil action.

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OPINIONS BELOW

Petitioner's Petition for *en banc* review to the Eleventh Circuit Court of Appeals was denied on September 25, 2002, in an unpublished order. It is reprinted in the Appendix attached hereto as App. 17. The Opinion of the court of appeals is reported at 46 Fed. Appx. 620; 2002 WL 1799704 (11th Cir. 2002). It is reprinted at page App. 14. The opinion of the district court, which was incorporated in the order denying petitioner's appeal, is unreported. It is reprinted at page App. 2.

JURISDICTION

On December 17, 2001, the District Court, the Honorable Jack T. Camp presiding, granted both of Respondent Nortel's Motions for Summary Judgment. Ms. Watkins filed a timely Notice of Appeal on January 16, 2002. In their respective Orders, the District Court and the Court of Appeals held that Ms. Watkins' delay in challenging the validity of the severance and retirement package constituted a waiver and her failure to tender back the proceeds precluded her from bringing this action.

The Court of Appeals panel, consisting of Judges Black, Carnes and Hull, affirmed the decision of the lower court on July 23, 2002. It is reprinted at page App. 14. A timely petition for *en banc* review was filed on August 13, 2002. The petition for *en banc* review was denied on September 25, 2002. It is reprinted at page App. 17. The jurisdiction of this Court is invoked under 28 U.S.C.

§1254(1). This petition has been filed within 90 days of the Circuit Court's denial for *en banc* review.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §626(f) provides in relevant part as follows:

> (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement; (G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

O.C.G.A. §13-5-5 provides in relevant part as follows:

> Fraud renders contracts voidable at the election of the injured party.

O.C.G.A. §13-5-4 provides in relevant part as follows:

> If the consideration upon which a contract is based was given as a result of a mutual mistake of fact or of law, the contract cannot be enforced.

O.C.G.A. §13-5-6 provides in relevant part as follows:

> Since the free assent of the parties is essential to a valid contract, duress, either by imprisonment, threats, or other acts, by which the free will of the party is restrained and his consent induced,

renders the contract voidable at the election of the injured party. . . .

STATEMENT OF THE CASE

I. Procedural History

On December 20, 2001, an action was commenced by Petitioner/Plaintiff, Betty J. Watkins (hereinafter "Petitioner" or "Ms. Watkins"), against Respondent/Defendant, Nortel Networks, Inc. d/b/a Northern Telecom, Inc. (hereinafter "Respondent" or "Nortel") in the Superior Court of Fulton County, State of Georgia, entitled *Betty J. Watkins v. Nortel Networks, Inc. d/b/a Northern Telecom, Inc.* (R1-1-Ex.1). In said action, Ms. Watkins sought to rescind the severance agreement given to her when she left Nortel, based upon fraud, duress and mutual mistake of the understanding of the OWBPA. The case was subsequently removed to the federal district court for the Northern District of Georgia, Atlanta Division, based on diversity of citizenship and an amount in controversy over $75,000.00. (R1-1-Ex.1).

On June 19, 2001, Ms. Watkins filed an Amended Complaint, which served to reduce the scope of the original Complaint, not expand it, by removing claims for damages. (R1-15). Nortel then filed an Amended Answer including a Counterclaim on July 2, 2001. Concurrently therewith, Nortel filed a Motion for Summary Judgment on the Counterclaim. (R1-18; R1-17). Nortel filed a second Motion for Summary Judgment on July 16, 2001. (R1-20).

On December 17, 2001, the District Court, the Honorable Jack T. Camp presiding, granted both of Nortel's Motions for Summary Judgment and denied Ms. Watkins'

Motion to Strike Nortel's Counterclaim. (R2-45). In its Order, the Court held that Ms. Watkins' delay in challenging the validity of the severance agreement constituted a waiver and her failure to tender back the proceeds precluded her from bringing this action. (R2-45).

Ms. Watkins filed her Notice of Appeal from the Judgment entered on December 17, 2001. (R2-47). The Court of Appeals Panel, consisting of Judges Black, Carnes and Hull, affirmed the decision of the lower court on July 23, 2002. Ms. Watkins then filed a timely Petition for *en banc* review. That petition was denied on September 25, 2002. The instant Petition for Writ of Certiorari is timely filed therefrom.

II. Statement Of Facts

Ms. Watkins first began working for Nortel at its manufacturing facility in Stone Mountain, Georgia, on January 7, 1980. (Pl. Dep.: R1-15-16; Pl. Decl.: R2-32-Ex.1-1). During the last twelve years of Ms. Watkins' employment with Nortel, she was employed as a change management specialist, and her job duties and responsibilities consisted of managing design changes on Nortel's current products. (Pl. Decl.: R2-32-Ex.1-2). During the last year of Ms. Watkins' employment with Nortel, she performed the majority of her employment duties and responsibilities from her home in Clarkston, Georgia. (Pl. Dep.: R1-15-32).

On or about September 21, 1998, Ms. Watkins heard rumors that Nortel was implementing a major reduction in force ("RIF"). (Pl. Dep.: R1-15-37; Pl. Decl.: R2-32-Ex.1-3). At that time Ms. Watkins was 57 years old. (Pl. Dep.: R1-15-34). Ms. Watkins called her supervisor, Robert McQuaig, with questions regarding whether her position

was being eliminated in the RIF. (Pl. Dep.: R1-15-37, 38; Pl. Decl.: R2-32-Ex.1-4). Mr. McQuaig assured Ms. Watkins that her position was not being eliminated or otherwise effected in the RIF. (Pl. Dep.: R1-15-37; Pl. Decl.: R2-32-Ex.1-5).

On September 28, 1998, Mr. Stan Chilton and Ms. Elizabeth Landy telephoned Ms. Watkins' home office. (Pl. Dep.: R1-15-21, 22; Pl. Decl.: R2-32-Ex.1-8). When Ms. Watkins answered the call, she used a speaker-phone, as was her custom when working. (Pl. Dep.: R1-15-22; Pl. Decl.: R2-32-Ex.1-9). Mr. Chilton immediately asked Ms. Watkins to pick up the handset because the conversation they were about to have was private. (Pl. Dep.: R1-15-22; Pl. Decl.: R2-32-Ex.1-10). Mr. Chilton proceeded to introduce Ms. Landy and himself. (Pl. Dep.: R1-15-22; Pl. Decl.: R2-32-Ex.1-11). Mr. Chilton informed Ms. Watkins that they would like to offer her a secret and private proposal that included a severance agreement as part of a RIF. (Pl. Dep.: R1-15-23; Pl. Decl.: R2-32-Ex.1-12). Specifically, Mr. Chilton and Ms. Landy offered Ms. Watkins a severance agreement whereby Ms. Watkins would receive severance payments for 23 weeks, after which she would be entitled to retirement benefits commencing on June 1, 1999. (Pl. Dep.: R1-15-23; Pl. Decl.: R2-32-Ex.1-13).

Ms. Landy and Mr. Chilton informed Ms. Watkins that she could not discuss the offer with anyone, including Mr. McQuaig. (Pl. Dep.: R1-15-40, 57, 127, 137, 138, 146; Pl. Decl.: R2-32-Ex.1-14). Mr. Chilton and Ms. Landy informed Ms. Watkins that she had to sign the severance agreement the following day, or the offer would be withdrawn. (Pl. Dep.: R1-15-38, 39, 57, 58, 107, 113, 114, 127, 128, 136, 140, 146; Pl. Decl.: R2-32-Ex.1-15). Mr. Chilton and Ms. Landy informed Ms. Watkins that she needed to

come into the office the next day to sign the papers, and Ms. Watkins made an appointment to meet with them. (Pl. Dep.: R1-15-29, 30; Pl. Decl.: R2-32-Ex.1-16). Ms. Watkins, confused and distraught about the secrecy and fearing that her job was in jeopardy, met with Elizabeth Landy on September 29, 1998. (Pl. Dep.: R1-15-31,32,39,40; Pl. Decl.: R2-32-Ex.1-17).

When Ms. Landy met with Ms. Watkins, she presented Ms. Watkins with a severance agreement. (Pl. Dep.: R1-15-38,39; Pl. Decl.: R2-32-Ex.1-18). Ms. Watkins noted to Ms. Landy that the severance agreement documents provided 45 days during which Ms. Watkins could review the severance agreement. (Pl. Dep.: R1-15-38; Pl. Decl.: R2-32-Ex.1-19). However, Ms. Landy told Ms. Watkins that the deadline for accepting the severance agreement was the next day, September 30, 1998. (Pl. Dep.: R1-15-39; Pl. Decl.: R2-32-Ex.1-20). Ms. Watkins also asked Ms. Landy why she had to keep the severance agreement a secret and could not discuss it with her immediate supervisor, Robert McQuaig. (Pl. Dep.: R1-15-39; Pl. Decl.: R2-32-Ex.1-21). Ms. Landy informed Ms. Watkins that "they" would take care of Mr. McQuaig and that they did not want anyone to know they were offering her this severance agreement until after the RIF was over. (Pl. Dep.: R1-15-39).

Ms. Watkins feared that if she did not sign the agreement, she would be promptly terminated and left with nothing after 19 years of service. (Pl. Decl.: R2-32-Ex.1-22). As a result of Ms. Watkins' fears and the short window of opportunity that she was given to make a decision, Ms. Watkins executed the severance agreement on September 29, 1998. (Pl. Decl.: R2-32-Ex.1-23). Ms. Watkins was paid

her severance over a period of time from December, 1998, to May, 1999. (Pl. Dep.: R1-15-45).

Ms. Watkins was paid severance over approximately five and a half months. (Pl. Dep.: R1-15-45). Ms. Watkins did not complain or challenge the severance agreement at that time because she feared that once she began to ask questions that Nortel would cease paying her benefits. As any reasonable person in a similar situation would do, Ms. Watkins waited until she had received all of the payments pursuant to the agreement prior to challenging the agreement legally.

Furthermore, the severance agreement executed by Ms. Watkins contained an illegal tender back provision, indicating that Ms. Watkins would have to tender back the money paid to her under the severance agreement in order to challenge it. By signing the severance agreement, Ms. Watkins released and waived all of her claims under the OWBPA. (*See* severance agreement: R2-32-Ex.2). Ms. Watkins was 57 years old at the time she executed the agreement. (Pl. Dep.: R1-15-34).

REASONS FOR GRANTING THE PETITION

I. Concise Statement Of The Case

The lower courts erred by concluding that Ms. Watkins' failure to tender back the proceeds that she received under the severance agreement precluded her from bringing this action. (R2-45-7). The District Court held that this Court's decision in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 139 L. Ed. 2d 849, 118 S. Ct. 838 (1998), was limited to claims under the Older Workers Benefit Protection

Act ("OWBPA") and did not address the fact that one of Ms. Watkins' underlying claims was a mistake of law concerning the parties' understanding of the meaning of the OWBPA as it relates to the 45/7 day provision and one claim was a mistake of law concerning the tender back requirements of the OWBPA. (R2-45-8). The District Court also erroneously granted, and the Circuit Court erroneously upheld, Respondent's Motion for Summary Judgment, holding that Ms. Watkins' failure to challenge the validity of the severance agreement quickly enough after Ms. Watkins suspected fraud constituted a waiver. (R2-45-7). The severance agreement executed by Ms. Watkins did, in fact, release and waive claims under the OWBPA and her underlying claims related to said statute.

The lower courts further erred by holding that Ms. Watkins waived her right to challenge the legality of the Release due to the length of time between when Ms. Watkins signed the Release and when this suit was filed. (R2-45-7). The determination of whether a party has waived her right to challenge the validity of a contract is a question for the jury and should not be decided upon by the court in a motion for summary judgment. *See Stovall & Strickland v. McBrayer*, 20 Ga. App. 93, 94; 92 S.E. 543 (1917).

Furthermore, the District Court erred by holding that the Ms. Watkins was barred from bringing this action due to her failure to tender back the proceeds obtained by signing the severance agreement. (R2-45-7). Ms. Watkins was not required to tender back the proceeds based upon this Court's decision in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 139 L. Ed. 2d 849, 118 S. Ct. 838 (1998).

The question of the promptness of Ms. Watkins' challenge to the severance agreement is a question for the jury; therefore, the District Court erred in holding that any delay by Ms. Watkins constituted a waiver of her claims. In addition, the District Court erred in refusing to extend the holding in *Oubre* beyond the OWBPA and misapplied the law. Furthermore, Respondent was still required to comply with the provisions set out by Congress in the OWBPA.

The holding in *Oubre* should be extended to all cases that release OWBPA claims, even if the underlying claims are not clearly OWBPA or other age claims.

The lower courts did not determine whether Ms. Watkins had the capacity to enter into the severance agreement because of duress or whether she was either mistakenly informed that she had to sign the next day or fraudulently induced to sign the release the next day. Instead, the lower courts rested their opinions on waiver and Ms. Watkins' failure to tender back when making their decisions. (R-45-7). By not determining the enforceability of the severance agreement itself, the courts have given employers a way to enforce what would otherwise be unenforceable severance agreements. This policy is clearly in conflict with this Court's policy articulated in *Oubre*. The instant case is the type of case anticipated by *Oubre*, wherein this Court can define, refine and expand on older workers' and other rights as they relate to severance agreements and waivers.

Furthermore, an employee should not be required to tender back proceeds paid in a severance agreement that were earned, such as vacation pay, sick pay, unemployment, worker's compensation, or future ERISA, COBRA,

and HIPPA rights, etc. Requiring an employee to tender back money already earned to an employer in order to challenge a severance agreement rewards an employer for its bad deeds.

II. The Lower Courts' Holdings Are In Conflict With This Court's Holding In *Oubre V. Entergy Operations, Inc.*, 522 U.S. 422, 139 L. Ed. 2d 8849, 118 S. Ct. 838 (1998).

Both the District Court and the Circuit Court erred by holding that Ms. Watkins was barred from bringing this action due to her failure to tender back the proceeds obtained by signing the severance agreement. (R2-45-7). Ms. Watkins was not required to tender back the proceeds based upon this Court's decision in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 139 L. Ed. 2d 8849, 118 S. Ct. 838 (1998). In addition, the severance agreement did release and waive age claims; therefore, *Oubre* is certainly applicable.

The lower courts did not determine whether the severance agreement was enforceable, but rather relied on waiver based upon time and Ms. Watkins' failure to tender back when making their decisions. (R-45-7). By not determining the enforceability of the severance agreement itself, the courts have given this employer a way to enforce what would otherwise be an unenforceable waiver. In this case, Ms. Watkins has alleged that she was subjected to fraud and duress when she executed the severance agreement. In the alternative, Ms. Watkins alleges that there was a mutual mistake as to how long Ms. Watkins could review the release before she signed it. However, the lower courts did not even attempt to determine the validity of

these claims because they held that Ms. Watkins' failure to tender back the proceeds rendered her claims moot.

It is important that this Court review this case to determine if an employer may force an employee to sign a severance agreement, which includes age provisions, in order to obtain the benefits under the severance agreement, and then require the employee to return the funds to challenge the release. This is clearly in conflict with this Court's decision in *Oubre*.

The lower courts also erred by holding that Ms. Watkins waived her right to challenge the enforceability of the severance agreement due to the length of time between when Ms. Watkins signed the severance agreement and when this suit was filed. (R2-45-7). The determination of whether a party has waived her right to challenge the validity of a contract is a question for the jury and should not be decided upon by the court in a motion for summary judgment. *See Stovall & Strickland v. McBrayer*, 20 Ga. App. 93, 94; 92 S.E. 543 (1917). App. 93, 94; 92 S.E. 543 (1917).

III. The Lower Courts' Granting Of Summary Judgment Based Upon Petitioner's Failure To Tender Back The Proceeds Was Erroneous.

A. This Court's Decision In *Oubre V. Entergy Operations, Inc.*, Applies To The Instant Case.

The District Court and Circuit Court concluded that this Court's decision in *Oubre* did not extend beyond releases and claims dealing with the OWBPA. First, this case addresses a severance agreement in which claims under the OWBPA are waived. Moreover, the policy considerations

reached in the Court's decision in *Oubre* extend well beyond the OWBPA. The Court in *Oubre* stated:

> [t]he rule proposed by the employer would frustrate the statute's practical operation as well as its formal command. In many instances a discharged employee likely will have spent the monies received and will lack the means to tender their return. These realities might tempt employers to risk noncompliance with the OWBPA's waiver provisions, knowing it will be difficult to repay the monies and relying on ratification.

Id. Clearly, the Rule in *Oubre* reaches beyond the OWBPA.

The argument made by the Court in *Oubre* should apply to any severance agreement releasing federal claims, especially ones releasing OWBPA claims. Without extending the rule of *Oubre* beyond the OWBPA, employers can fraudulently induce employees into signing severance agreements with the knowledge that the employees will be able to do nothing about it later without tendering back the proceeds. As in this case, Ms. Watkins was either fraudulently induced or the parties were mistaken as to how long Ms. Watkins had to review the Release. However, by requiring an employee to tender back the proceeds given to her under a severance agreement before allowing her to challenge that agreement, the courts are effectively denying employees the ability to challenge a waiver. Therefore, Nortel can argue that even if a fraud had occurred, Ms. Watkins affirmed the contract by failing to act with diligence to rescind the contract. "Applying these principles, the employer claims the employee ratified the ineffective release (or faces estoppel) by retaining all the sums paid in consideration of it. The employer, then, relies

not upon the execution of the release but upon a later, distinct ratification of its terms." *Oubre*, *supra* at 426.

Using a logical application of the Court's decision in *Oubre,* it is plain to see that Ms. Watkins has not ratified the contract by failing to tender back the monies paid to her in exchange for signing the invalid severance agreement. If this were the case, then employers can essentially force employees to sign whatever agreements the employers put forth or give the employees nothing, even that which has already been earned, then when the agreement is challenged, the employers can rely on the employee's inability to repay the monies paid under the illegal agreement.

B. Employers Should Not Be Able To Secure Full Releases In Exchange For Earned Benefits.

As a general rule many severance agreements include benefits that have already been earned by an employee. Any monies owed an employee that have been earned prior to the execution of a severance agreement belong to the employee as a matter of right; for example: potential benefits under ERISA, COBRA, HIPPA, worker's compensation, back pay, unemployment insurance, vacation pay, bonus pay and sick leave. An employee simply should not have to tender back earned benefits in order to challenge a release. A severance package should be required at the least to itemize the total amount paid by category. In other words, without a list of what amount of money is paid for release and waiver and what is paid for earned benefits, it is impossible to determine what, if anything, should be tendered back.

Aside from the above argument relating to the OWBPA and *Oubre*, it is the employer's duty to determine, at the time the severance agreement is drafted, what is being paid specifically to secure the release in order to put forth true consideration in exchange for the release. Without doing so, employers earn windfalls when employees are required to tender back more than is necessary in order to challenge releases.

IV. The Lower Courts' Conclusion Based Upon Waiver Was Also Erroneous.

The District Court and Circuit Court concluded that Ms. Watkins waived her right to any claims of fraud, mutual mistake or duress due to her failure to bring this action sooner. (R1-45-7). Whether Ms. Watkins brought this action quickly enough after discovering the fraud is a question for the jury and cannot be determined by summary judgment. "Thus, '[t]he question as to what is a reasonable or proper time within which to rescind a contract depends upon the facts of the particular case and is ordinarily a question for the jury. . . . '" *Catrett v. Landmark Dodge, Inc.*, 253 Ga. App. 639, 642; 560 S.E.2d 101 (Ga. App. 2002), quoting *Newton v. Burks*, 139 Ga. App. 617, 619; 229 S.E.2d 94 (Ga. App. 1976). Therefore, the trial court cannot determine whether Ms. Watkins acted swiftly enough when attempting to rescind the release. "[U]nder the circumstances of this case, the trial court erred in holding as a matter of law that defendants did not rescind the contract within a reasonable time." *Stovall & Strickland v. McBrayer*, 20 Ga. App. 93, 94; 92 S.E. 543 (1917). Ms. Watkins was required to act "promptly" to rescind the agreement once she discovered the fraud. However, the "[w]ord 'promptly' as used in this

section, does not mean immediately, but means within reasonable time." *Kerr Glass Mfg. Co. v. Americus Grocery Co.*, 13 Ga. App. 512, 79 S.E. 381 (1913); *Stovall, supra*. Promptness is a question for the jury. It is clear that the question of whether Ms. Watkins attempted to rescind the contract promptly enough to avoid ratification is a question for the jury and cannot be ruled upon by the court on a motion for summary judgment. Therefore, the Circuit Court's previous ruling based upon waiver is contrary to the law of the State of Georgia. Only a jury can determine based upon the facts in this case whether Ms. Watkins' delay in challenging the release constituted a waiver.

CONCLUSION

Due to the importance of the issues raised in Ms. Watkins' Petition, it is necessary for this Court to review this case in its entirety to determine if an employer, in fact, can force an employee to sign an illegal release in order to obtain a severance package knowing that it is unlikely that employee will be able to tender back the funds in order to challenge the release.

WHEREFORE, for the afore-mentioned reasons, Petitioner requests that the judgment of the District Court and Circuit Court be reversed and that this case be remanded for trial.

Respectfully submitted this 23rd day of December, 2002.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BETTY J. WATKINS, Plaintiff, v. NORTEL NETWORKS, INC. d/b/a NORTHERN TELECOM, INC., Defendant.	:	CIVIL ACTION NO. 1:01-CV-231-JTC

ORDER

(Filed Nov. 28, 2001)

Plaintiff, Betty Watkins, brings this action, against Defendant, Nortel Networks, challenging the validity of a "Release and Acknowledgment" contract which the parties entered into. The following motions are presently pending before the Court: Defendant's Motion to Extend Time for Discovery [#16-1]: Defendant's Motion for Summary Judgment on its Counterclaim [#17-1]: Defendant's Motion for Summary Judgment [#20-1]: Defendant's Motion to Extend Discovery Sixty Days [#23-1]; Plaintiff's Motion to Strike Defendant's Counterclaim Complaint [#24-1]; Plaintiff's Motion for Sanctions [#31-1]; Plaintiff's Motion to Amend Complaint [#33-1]; and Defendant's Motion to Extend Time to File Pretrial Order [#43-1].

I. Background

Unless otherwise noted, the following facts are undisputed. Plaintiff began her employment with Defendant in

1980. In September of 1998, Plaintiff became aware that Defendant was implementing a reduction-in-force ("RIF"). Plaintiff approached her supervisor and asked if the RIF would affect her department. The supervisor told her that it would not and reassured Plaintiff that she would not lose her job. Plaintiff responded that she would be interested in retiring early if that opportunity were available. Several days later, on September 28. Plaintiff was contacted by Stan Chilton and Elizabeth Landy, employees of Defendant, who told Plaintiff that her request for early retirement had been approved.

On September 29, Plaintiff met with Landy and was given her severance and retirement documents. Though the contract contained a provision stating that Plaintiff had forty-five days to consider the agreement. Plaintiff claims that Landy told her the deadline for signing the contract was the next day, September 30. In addition, Plaintiff claims Landy told her that she could not discuss the contract with anyone, though there was a provision in the contract suggesting that the contract be discussed with an attorney.

The contract contained a release stating that Plaintiff agreed to

> "voluntarily and completely release Nortel, to the extent permitted by law, from any and all claims, whether known or unknown, direct or indirect, relating to [her] employment or termination of employment from Nortel, which [she] now [has] or ever had against Nortel, as of the date [she] sign[s] this release. The claims which [she is] releasing include, but are not limited to, to the following: (I) claims for wages, benefits . . . and (iii)

> claims based in contract or tort, such as . . . misrepresentation . . . or any other common law claim."

Plaintiff signed the retirement and severance contracts during the September 29th meeting. Plaintiff claims that she signed the contract because she was afraid she would lose her job if she did not.

After signing the contract, Plaintiff continued her employment with Defendant until November 30, 1998, and thereafter worked in her same position through a temporary placement agency until February 1999. In October or November of 1999, Plaintiff telephoned Chilton and told him she believed she had been unfairly terminated. At this point, Plaintiff has not made any efforts to restore the payments she received under the contract.

Plaintiff seeks to rescind the Severance Package based on fraud, duress, and mutual mistake. In Plaintiff's second amended complaint she outlines these claims. Plaintiff claims there was fraud in that Defendant, through its employees, falsely asserted that the contract had to be signed by September 30, 1998. Plaintiff further claims that Defendant did this with the intent to deceive Plaintiff into executing the contract. She claims mutual mistake in that Defendant and Plaintiff understood that the plan had to be executed no later than September 30, while the agreement said Plaintiff had forty-five days to consider the contract. She also claims that there was mutual mistake in that Defendant and Plaintiff understood that the money paid to Plaintiff under the agreement had to be returned for Plaintiff to file suit. Lastly, Plaintiff claims that the contract should be rescinded because she signed it under duress in that she reasonably believed if she did not sign the contract she would lose her job. Plaintiff also claims

duress in that Plaintiff reasonably believed that she could not bring an action to set aside the agreement without returning the money given her by Defendant. Plaintiff asks that the Severance Package be rescinded and that she be restored to her former position with all make-whole benefits. Plaintiff has not at this point, asserted an Age Discrimination in Employment claim.

Defendant argues that Plaintiff is precluded from rescinding the contract because Plaintiff did not promptly seek recission, has not returned the benefits under the contract, and has affirmed the contract.

II. Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure defines the standard for summary judgment: Courts should grant summary judgment when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." The substantive law applicable to the case determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "The district court should 'resolve all reasonable doubts about the facts in favor of the non-movant,' . . . and draw 'all justifiable inferences . . . in his favor. . . .'" *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991). The court may not weigh conflicting evidence nor make credibility determinations. *Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 919 (11th Cir. 1993), *rh'g denied*, 16 F.3d 1233 (1994) (en banc).

As a general rule, "[the] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and

identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). However, the moving party's responsibility varies depending upon which party bears the burden of proof at trial on the issue in question.

For issues upon which the moving party bears the burden of proof at trial, the moving party must affirmatively demonstrate the absence of a genuine issue of material fact as to each element of its claim on that legal issue. It must support its motion with credible evidence that would entitle it to a directed verdict if not controverted at trial. If the moving party makes such a showing, it is entitled to summary judgment unless the non-moving party comes forward with significant, probative evidence demonstrating the existence of an issue of fact. *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1115 (11th Cir. 1993) (quoting *Four Parcels,* 941 F.2d at 1437-38).

On the other hand, when the non-moving party bears the burden of proof at trial, the moving party is not required to support its motion with affidavits or other similar material negating the opponent's claims. Instead, the moving party may simply point out to the district court that there is an absence of evidence to support the non-moving party's case on the issue in question. *Id.* at 1115-16. Of course, the moving party may offer evidence to affirmatively negate a material fact upon which the non-movant has the burden and which is essential to its claim. In either case, the non-moving party may not rely upon allegations or denials in the pleadings, but instead must respond with sufficient evidence to withstand a directed

verdict motion at trial. Fed. R. Civ. P. 56(e); *Hammer v. Slater,* 20 F.3d 1137, 1141 (11th Cir. 1994) (citing *Fitzpatrick*, 2 F.3d at 1116-17).

Because there is no genuine issue of material fact as to Plaintiff's claims, Defendant's Motion for Summary Judgment [#20-1] is **GRANTED**.

III. Analysis

An unreasonable delay in rescinding a contract can result in a waiver of claims. *See Manning v. Beasley,* 193 Ga. 82, 90 (1941) ("A delay in seeking a rescission and restoring or offering to restore the benefits received under the contract may constitute a waiver of the fraud and a bar to a rescission"); *Orion Capital Partners, L.P. v. Westinghouse Electric Corp.,* 223 Ga. App. 539, 543 (1996) (finding that a seven month delay precluded effective recission).

Plaintiff testified that she suspected fraud approximately one month after signing the contract. *Pl. Dep. pg. 113.* She made no attempt at this point to rescind the contract. She continued to work for Defendant for five more months, but still made no attempt to rescind. She did not raise any concerns to Defendant regarding the contract until one year after its signing. This delay is unreasonable as the language of the contract is clear and unambiguous. This unreasonable delay results in a waiver of Plaintiff's claims.

Even if Plaintiff's claims were not waived, she is precluded from rescinding the contract because she has not tendered back the benefits she received under such contract. "A party seeking recission on account of fraud

must not only restore or offer to restore what he has received, but must do so before entering his suit." *George Baptist Orphans Home v. Moon,* 192 Ga. 81, 85 (1941); *accord Wender & Roberts, Inc. v. Wender,* 238 Ga. App. 355, 360 (1999) ("A party seeking to rescind a contract for fraud must restore or tender back the benefits received under the contract"). Claims of duress also require that the claimant return the benefits received under the contract. *See Walton v. James & Dean, Inc.,* 177 Ga. App. 77, 78 (1985). There is no genuine issue of material fact as to whether Plaintiff restored the benefits she received under the contract to Defendant. She did not, and has not offered to.

Plaintiff argues, however, that the tender back requirement does not apply here, under the reasoning of *Oubre v. Entergy Operations, Inc.,* 118 S.Ct. 838, 522 U.S. 422 (1998). *Oubre* dealt with releases covered under the Older Workers Benefit Protection Act ("OWBPA"). This act imposes specific requirements on contracts which release Age Discrimination in Employment Act claims ("ADEA"). The Supreme Court in *Oubre* found that a contract which releases ADEA claims is not valid unless the specific requirements of the OWBPA have been met, regardless of whether the claimant has tendered back the benefits received under such contract. The policy justification for this was that if tender back were required, employers could escape the specific requirements of the OWBPA by intentionally entering into a release that did not comply, knowing that the claimants would later have a difficult time repaying the monies received under the contract. *Oubre* 118 S.Ct. at 842, 522 U.S. at 427.

Plaintiff here, has not asserted an ADEA claim. She has asserted only the state law claims of fraud, duress,

and mutual mistake. Though the Court in *Oubre* makes clear that tender back is not required when dealing with the release of an ADEA claim, it does not change the tender back requirement as to state law claims. The Court recognized that a release may be invalid as to ADEA claims and valid as to state law claims. Specifically the court said "[t]he OWBPA governs the effect under federal law of waivers and releases on ADEA claims and incorporates no exceptions or qualifications. The text of the OWBPA forecloses the employer's defense, *notwithstanding how general contract principals would apply to non-ADEA claims.*" *Oubre* 118 S.Ct. at 842, 522 U.S. at 427.

The argument Plaintiff makes here, was considered by the 10th Circuit in *Bennett v. Coors Brewing Co.* There, in considering both the OWBPA and the *Oubre* opinion, the court found that "while [plaintiffs'] failure to tender back their severance benefits can act as a ratification of the waiver as to their state law claims . . . it has no effect on their ability to challenge the waivers of their ADEA claims under the OWBPA." *Bennett v. Coors Brewing Co.*, 189 F.3d 1221, 1234 (10th Cir. 1999). Quite simply, Plaintiff has expanded the reasoning of the *Oubre* opinion beyond what was intended by the Supreme Court.

Because the Plaintiff unreasonably delayed in attempting to rescind the contract, and because she has not tendered back the benefits she received under the contract, she cannot now rescind it based on fraud, duress, or mutual mistake. Therefore, there is no genuine issue of material fact as to her state law claims.

IV. Defendant's Counterclaim

Defendant asserts that Plaintiff breached the contract at issue, by failing to fulfill a condition precedent prior to challenging such contract. The condition precedent required that prior to challenging the release, Plaintiff must tender back the money received under such release, giving Defendant an opportunity to either cancel the release or go forward with the dispute placing the money in escrow. As previously stated, Plaintiff made no attempts to tender back the monies received.

Plaintiff asks that the Court strike Defendant's counterclaim because Defendant did not seek leave of court before filing an amended answer and counterclaim. Leave of court was not necessary however, as this filing was responsive to Plaintiff's first amended complaint. Fed.R.Civ.P. 13. Accordingly, Plaintiff's Motion to Strike Defendant's Counterclaim [#24-1] is **DENIED**. Because Plaintiff has not made an effort to comply with the condition precedent required by the release, Defendant's Motion for Summary Judgment on its Counterclaim [#17-1] is **GRANTED**, in that Plaintiff is precluded from further asserting the state law claims of fraud, duress, and mutual mistake.

V. Conclusion

Defendant's Motion for Summary Judgment [#20-1] is **GRANTED**. Defendant's Motion to Extend Time for Discovery [#16-1]: Defendant's Motion to Extend Discovery Sixty Days [#23-1]: and Defendant's Motion to Extend Time to File Pretrial Order [#43-1] are **DENIED** as moot. Plaintiff's Motion to Amend Complaint [#33-1] is **GRANTED** inasmuch as such complaint was considered

by the Court. Defendant's Motion for Summary Judgment on its Counterclaim [#17-1] is **GRANTED**. Plaintiff's Motion to Strike Defendant's Counterclaim Complaint [#24-1]; and Plaintiff's Motion for Sanctions [#31-1] are **DENIED**.

SO ORDERED, this 26 day of November, 2001.

/s/ Jack T. Camp
JACK T. CAMP
UNITED STATES
DISTRICT JUDGE

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10330
Non-Argument Calendar

D.C. Docket No. 01-00231-CV-JTC-1

BETTY J. WATKINS,

Plaintiff-Counter-
Defendant-Appellant,

versus

NORTEL NETWORKS, INC.,
d.b.a. Northern Telecom, Inc.,

Defendant-Counter-
Claimant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(July 23, 2002)

Before BLACK, CARNES and HULL Circuit Judges.

PER CURIAM:

Appellant Betty J. Watkins filed suit against Appellee Nortel Networks, Inc. alleging she was induced to accept a

severance pay package by fraud, duress, and mutual mistake. Upon Appellee's motion, the district court granted summary judgment in favor of Appellee. Appellant now appeals the district court's order.

In granting summary judgment to Appellee, the district court determined Appellant waived all her claims because she unreasonably delayed in attempting to rescind the severance contract and release. Although the district court concluded Appellant waived her claims and, therefore, did not need to address any other issues relating to the viability of Appellant's claims, the district court also concluded Appellant was precluded from rescinding her severance contract and release because she had not tendered back the benefits she received under the contract. On appeal, Appellant argues the district court erred in concluding she waived her claims and was required to tender back the benefits she received.

For the reasons stated in the district court's order, we affirm as to all issues raised in this appeal.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BETTY J. WATKINS, Plaintiff, vs. NORTEL NETWORKS, INC., d/b/a NORTHERN TELECOM, INC., Defendant.	CIVIL ACTION FILE NO. 1:01-cv-231-JTC (Filed Jan. 30, 2002)

JUDGMENT

This Action having came before the court, Honorable Jack T. Camp, United States District Judge, for consideration of defendant's motion for summary judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby, is **dismissed**.

Dated at Atlanta, Georgia, this 17th day of December, 2001.

LUTHER D. THOMAS
CLERK OF COURT

By: /s/ Andrew Thomas
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
December 17, 2001
Luther D. Thomas
Clerk of Court
By: /s/ Andrew Thomas
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10330-JJ

BETTY J. WATKINS,

Plaintiff-Counter-
Defendant-Appellant,

versus

NORTEL NETWORKS, INC.,
d.b.a. Northern Telecom, Inc.,

Defendant-Counter-
Claimant-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

(Sep. 25, 2002)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir. 19___, ___ F.2d ___).

Before: BLACK, CARNES and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested

that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan A. Black
UNITED STATES CIRCUIT
JUDGE